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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PAUL W. PANCZKO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner, Paul W. Panczko respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on November 29, 1965.

JUDGMENT AND OPINION OF THE COURT BELOW

On November 29, 1965, the United States Court of Appeals for the Seventh Circuit reversed and remanded a judgment of conviction entered in the United States Dis-

trict Court for the Northern District of Illinois, Eastern Division. The judgment thus reversed had sentenced petitioner to imprisonment for a term of ten years. No opinion was rendered by the District Court. The opinion of the Court of Appeals has not yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, petitioner was convicted of unlawful possession of "two United States mail keys" in violation of Title 18 U. S. Code, Section 1704.

On appeal to the 7th Circuit Court of Appeals that judgment was reversed and the cause remanded for a new trial by an opinion filed November 29, 1965 (Appendix A).

Your petitioner filed a timely petition for rehearing which was denied on December 21, 1965 (Appendix B).

The jurisdiction of this court is invoked under the provisions of Title 18, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a Court of Appeals totally ignores an argument on appeal, and thereby effectively denies *sub silentio* a claim for relief, making no slightest reference to appellant's significant contentions, has the appellant been denied due process of law by said Court of Appeals?

If so, is such denial of due process cured by a grant to the appellant of partial relief on other grounds?

2. May a reviewing court, in the exercise of its statutory power to "require such further proceedings to be had as may be just under the circumstances" as authorized by 28 U.S.C. 2106, take action which would otherwise be violative of the Constitution of the United States?

3. Where a trial court erroneously denies a motion for judgment of acquittal for failure of proof, may a reviewing court grant the government a second opportunity to supply the missing proof?

If so, need some special grounds or circumstances be shown?

In that behalf, should this court's holding in *Bryan* v. *United States,* 338 U.S. 552 and *Forman* v. *United States,* 361 U.S. 416 be modified or overruled?

4. Is Title 18 U.S. Code, Section 1704, as applied to the possessor of a mail key, unconstitutional for failure to express any ascertainable standard of guilt?

5. May a criminal defendant properly be charged with unlawful possession of "mail keys" in violation of 18 U.S.C. 1704, without any allegation that the keys in question are suited to any lock adopted and used by the Post Office Department?

6 Is an indictment sufficient under 18 U.S.C. 1704 in the absence of any specification of the nature of the alleged unlawful and improper intent?

STATUTES INVOLVED

The relevant portions of both statutes are set forth within Appendix C. The statutes are:

(a) Title 18 U.S. Code, Section 1704.

(b) Title 18 U.S. Code, Section 2106.

STATEMENT OF THE CASE

Petitioner was indicted for violation of 18 U.S.C. 1704 in that he "did knowingly and unlawfully possess two United States mail keys * * * with the intent to unlawfully and improperly use and otherwise dispose of the said keys."

Petitioner moved to dismiss the indictment, alleging, essentially, that the indictment did not charge an offense; that it failed to inform petitioner of the nature and cause of his accusation; that the indictment was sufficiently vague and indefinite to impede the making of a defense; and that the statute was void for failure properly to express any ascertainable standard of guilt (A. 1). That motion was denied (A. 1, 2).

On the trial, it appeared that petitioner had thrown two keys from his car. Some boys, observing the episode, returned the keys to petitioner. Moments later the police arrested petitioner for erratic driving. The boys again found two keys on the ground and gave them to the police (A. 13, 18, 19).

Some keys were introduced in evidence over objection. They were not identified as the same keys found at the scene. The boys testified that the keys in evidence were "like" or "just like" the keys found at the scene (A. 18, 21).

It was shown that the arresting policeman had given to his superior the keys found at the scene (A. 25), and that the keys in evidence had been obtained from a different policeman prior to trial. (A. 27).

It was further proved that the keys in evidence would open certain mail depositories (A. 24). However, there was no showing that the keys in evidence were the same keys found at the scene of petitioner's arrest.

Petitioner was not shown to have taken or intended any action relative to any keys except for dropping keys to the ground as above stated.

Petitioner's motion for judgment of acquittal was denied (A. 28, 29). The jury found the defendant guilty, and a judgment of conviction was entered.

On appeal, petitioner urged that there had been a total failure of proof. He further urged that the statute was unconstitutional in its application to a possessor of "mail keys", and that the indictment had failed to state an offense.

The Court of Appeals reversed petitioner's conviction, and remanded for a new trial, principally on the ground that the jury had been unlawfully permitted to separate during its deliberations over petitioner's objection. The opinion conceded that the keys in evidence had not been connected to the defendant. (Appendix 7) However, no relief was awarded on that ground. The Court of Appeals directed that on retrial, "the keys allegedly thrown away by the defendant should be traced by an unbroken chain of evidence." (Appendix 7)

The Court of Appeals made no reference to petitioner's claim that the statute was invalid and the indictment defective.

Petitioner sought rehearing, contending that the failure of proof entitled him to an acquittal, and further objecting to the failure of the Court of Appeals to entertain his arguments that:

(a) There was no proof of any improper use or other disposition of the keys, or unlawful intent relative thereto.

(b) The statute was unconstitutional; and

(c) The indictment was insufficient.

The petition for rehearing was denied without comment.

Petitioner here seeks certiorari, claiming that the relief granted him in the Court of Appeals was inadequate.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

As to Denial of Due Process in the Court of Appeals.

Characteristically, an offended litigant contends in the reviewing court that he was denied due process at the trial level.

Yet, there can be no question that the requirement of due process are also mandatory on review. *Griffin* v. *Illinois,* 351 U.S. 12, 18.

The generally accepted elements of due process are notice, an opportunity to be heard and a finding supported by evidence (*Tot* v. *United States,* 319 U.S. 463, 473; *Smith* v. *Dental Products Co.,* 7 Cir. 1948, 168 F.2d 516, 519.)

But the right to be heard necessarily imports not only that one may speak, but that another shall listen.

So far as we know, the contention here made presents to your Honors a matter of first impression. Yet, we believe that to be the very proper office of a petition for certiorari.

Flatly stated, it is our position that where a reviewing court makes no slightest reference to significant points made by a litigant, which if passed upon might give him more relief than he was granted, then that litigant has been denied due process on appeal.

We would not contend that a reviewing court is required to make a detailed examination of every contention adduced by a litigant. We would unhesitatingly agree that

sometimes contentions are presented on review which are simply unworthy of discussion. For that reason, we would concede that the requirements of due process are satisfied where a reviewing court states that a litigant's contentions simply do not require discussion.

The Court of Appeals made no such statement in the case here sought to be reviewed. Petitioner's complaints as to the sufficiency of the charge against him and the constitutionality of the statute purportedly violated, are substantial and compelling. Yet, his treatment in the Court of Appeals was precisely what it would have been had he never sought to make those points.

The powers of a Court of Appeals are properly broad. We would not diminish them in any particular. But they cannot be said to extend to a refusal to entertain a reasonable contention properly made in a jurisdictionally valid appeal.

We cannot say to your Honors that the Court of Appeals erred in its holding as to the constitutionality of the statute. Regrettably, the Court of Appeals made no holding, and it is of that fact which we complain.

The question then is whether a Court of Appeals is empowered to direct that further proceedings be conducted under a statute, while refusing to hear a challenge, properly made, to the validity of that statute.

II.

As to Double Jeopardy.

The constitutional caveat is clear:

> "... (N)or shall any person be subject for the same offense to be twice put in jeopardy * * *" (Fifth Amendment to U.S. Constitution).

Granted: That right, like any right can be waived. But petitioner did not waive it. Nor did the Court of Appeals consider that he had waived it. That court simply directed, without any assignment of grounds, that the government, having failed in its first attempt to prove petitioner's guilt, be given a second opportunity to do so. (Appendix 7).

Had some showing been made of the existence of some special reason why that procedure was "just under the circumstances", 28 U.S.C. 2106, the action of the Court of Appeals would find some support in the holdings of this court. Petitioner suggests that a reconsideration of those holdings would be most appropriate.

Notwithstanding a flat constitutional prohibition against double jeopardy, a failure of prosecutive proof is simply not fatal to conviction. Consider any situation such as that at bar, in which the proof has failed. If the trial judge correctly rules that the proof has failed, the defendant is acquitted and retrial is barred. But if the trial judge errs and mistakenly holds the proof sufficient and enters judgment of conviction, the defendant is subjected to the expense of uncertainty of appeal; and if successful on appeal, he is retried.

The mere statement of the principle condemns it. If the government is sufficiently persuasive to induce the trial court to err on the sufficiency of the evidence, it is the defendant alone who is penalized, on review, for that error.

The Constitution does not say that no person shall "be subject for the same offense to be twice put in jeopardy unless the prosecution shall induce the trial court to error." The prohibition is absolute.

There is sound logic for the view that a defendant who appeals on the theory that he did not receive a fair trial, is in effect asking for a second trial. If his contention is sustained, he is given the second trial that he has requested, and the constitutional prohibition is inapplicable. But there is no logic to support the view that a defendant appealing on the theory that the evidence was insufficient, is asking for a second trial. He is asking for the acquittal that the trial court should have given him.

Nor is there logical support for the view that an appellant who makes *both* contentions, has waived his constitutional protection. In no other area of the law is a litigant forbidden to condition his request for lesser relief upon the denial of his request for primary relief. Certainly, a civil defendant is free to contend that the plaintiff did not prove a case in the same appeal in which he complains of trial errors. If it is found that the plaintiff failed to prove a case, a new trial is not awarded merely because the civil defendant also complained of trial errors. *A fortiori* a criminal defendant, cloaked with constitutional protection against double jeopardy, cannot be said to have waived that protection by claiming trial error in addition to claiming a failure of proof. The only logical determinant is the ground on which the conviction is reversed. Obviously, if it be held that the proof was sufficient but that trial errors occurred, a second trial should be ordered. But with equal force, a failure of proof should not result in a second trial merely because there were also other errors which denied the defendant a fair trial.

In *Bryant* v. *United States,* (1950) 338 U.S. 552, 558, the right of a Court of Appeals to order a retrial after finding failure of proof, was justified by reference to 28 U.S.C. 2106. That statute provides that a reviewing court may

"require such further proceedings to be had as may be just under the circumstances." But we are hopeful that your Honors will agree that the quoted statute did not have the effect of amending the Constitution. Obviously, a Court of Appeals has no right to impose an excessive fine, or to direct the infliction of cruel and unusual punishments, or to adjudge attainder or corruption of blood, or to adopt any other procedure forbidden by the Constitution. And for the same reason, the quoted statute does not empower a reviewing court to impose double jeopardy.

In *Forman* v. *United States,* (1960) 361 U.S. 416, the same result was reached in a case where the evidence had failed under one theory, but might have been sufficient under "an alternative theory". The principal thrust of *Forman* related to the power of a court of appeals to order a retrial on rehearing after having tentatively directed an acquittal.

It is respectfully urged that the holding of *Bryan* be reconsidered, and the holding of *Forman* limited, so as to place the onus of a failure of proof elsewhere than on the defendant.

III.

As to the Sufficiency of the Charge.

18 U.S.C. 1704 denounces the possession of a certain class of "mail lock or key with the intent unlawfully or improperly to use, sell or otherwise dispose of the same or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of * * *[1] The statute does not concern itself with a definition of "unlawful" or "im-

[1] It should be noted that the same statute also denounces the theft of certain mail box keys. That section of the statute is not material to this case, and the attack here made is not directed to the statute in that application.

proper" as therein used. Would it, for example, be an "improper" use of a mail key to use it to pry open a can of paint? Certainly, the key was not designed for such use; but equally, one who thus uses such a key would be understandably vexed to learn that he has hereby become a felon.

Under the statute, if a use is "improper", it need not be "unlawful". Those characterizations are stated in the disjunctive. And, assuredly, in the case at bar, there was no suggestion that petitioner violated or intended to violate any statute in his use or disposition of the keys.

In the Court of Appeals, the government successfully argued that the statute authorizes conviction of any person not employed by the post office who might have possession of such a key, "and did not intend to return the key to the postal authorities, but, on the contrary, intended to use this key for any other purpose." (Gov't. Brief in Court of Appeals, pp. 9, 10).

That interpretation has the questionable virtue of begging the question entirely. It probably reflects with some accuracy what a postmaster would say if asked to define an "improper" use of a mail key. After all, a postmaster has a proprietary interest in such matters, and the word "improper" leaves him free to adopt his subjective standard.

And that is the whole trouble. What is "improper" depends upon who makes the evaluation.

> "The vice of vagueness in criminal statutes is the treachery they conceal, either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.*, 255 U.S. 81) may be as much of a trap for the innocent as the ancient laws of Caligua." *United States* v. *Cardiff*, 344 U.S. 174, 176.

The statute has never been challenged before because, in its application to a possessor of keys, and as far as we can learn, this is the first time anyone has ever been charged under the statute. And once is enough.

For quite predictably, the indictment compounded the vagueness of the statute. It was charged simply that the defendant "did knowingly and unlawfully possess two United States mail keys bearing identification Nos. 41492, combination 248 and 293669, with the intent to unlawfully and improperly use and otherwise dispose of the said keys." (A. 1). A formless, misty denunciation seen through a glass, darkly.

In its use of the term "mail keys," the indictment transcended the statute in dimness. For the statute does not speak of "mail keys" generally, but only of "any key suited to any lock adopted by the Post Office Department and in use on any of the mails or bags thereof, or any key to any . . . authorized receptacle for the deposit or delivery of mail matter."

The indictment did not allege involvement with any key which was, on the date of the offense, in use on any mails or mail bags. Nor was it charged that the keys would open any authorized receptacle for mail. They were simply described as "mail keys". No more than that.

The allegations of the indictment, although not the statute, would have been satisfied if petitioner had possessed an archaic key to a pony express saddle bag, with the intent to melt it down to make a pornographic statue.

And the proof showed not much more than that. Viewed most favorably to the government, it showed nothing more than that petitioner threw two "mail keys" to the ground. According to the government, as previously quoted, petitioner was under a duty to return the keys to the Post

Office Department and not to throw them away; and his breach of this supposed duty was deemed sufficient cause for ten years' imprisonment.

In so far as the indictment charged the intent "to unlawfully and improperly use and otherwise dispose of the said keys", it flew in the teeth of *Keck* v. *United States,* 172 U.S. 434, 437.

In *Keck,* this court held that an indictment could not properly charge that a thing had been done "contrary to law", even where that was the sole statutory prohibition, without stating what law had been violated. The principle applies with even greater force to the case at bar.

The statute's only conceivable claim to constitutional acceptability would arise if the term "unlawfully" were deemed to mean in violation of yet another criminal statute, and the term, "improper" were deemed surplusage. And even on that rationale, under *Keck,* the indictment could not properly allege intent to make an "unlawful" use, without alleging specifically what illegality was contemplated. For an indictment may not merely repeat the words of a statute,

> ". . . unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished * * * (T)he language of the statute . . . must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Russell* v. *United States,* 369 U.S. 749, 765, citing *United States* v. *Carll,* 105 U.S. 611, 612, and *United States* v. *Hess,* 124 U.S. 483, 487.

To accuse a man of possessing "mail keys * * * with the intent to unlawfully and improperly use and dispose of the said keys", is to make an accusation so general as to render proofs uncertain and defense impossible. The conviction in this case, coming as it did in the absence of proof, is all too clear a showing of that fact.

CONCLUSION.

For the foregoing reasons we pray that your Honors will regard this case as worthy of review, and issue this Court's writ of certiorari to that end.

Respectfully submitted,

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JULIUS LUCIUS ECHELES
Attorneys for Petitioner

"APPENDIX A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 15028 SEPTEMBER TERM, 1965 SEPTEMBER SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL W. PANCZKO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 29, 1965

Before HASTINGS, *Chief Judge,* and DUFFY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Paul W. Panczko, defendant, appeals from a judgment of the district court sentencing him to a term of 10 years and fining him $500 and costs, following his plea of not guilty of violation of § 1704, Title 18 U.S.C. as charged in an indictment. There was a jury verdict finding him guilty.

§ 1704 provides, in part:

> Whoever steals, purloins, embezzles, or obtains by false pretense any key suited to any lock adopted by the Post Office Department and in use on any of the

mails or bags thereof, or any key to any lock box, lock drawer, or other authorized receptacle for the deposit or delivery of mail matter; or

Whoever knowingly and unlawfully makes, forges, or counterfeits any such key, or possesses any such mail lock or key with the intent unlawfully or improperly to use, sell, or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of; * * *

* * * * *

Shall be fined not more than $500 or imprisoned not more than ten years, or both. * * *

1. A jury, consisting of eight women and four men with two alternate jurors, was selected, and sworn on December 9, 1964. Trial commenced on December 10, 1964, when the first witness was called. The case was submitted to the jury for decision on Monday, December 14, 1964, at 4:30 P.M.

At 10:30 P.M. on the same day, the court announced that he was about to permit the jurors to "go to their respective homes, with the admonition that they, of course, speak to no one about the case or read anything about it, not to discuss it with anybody until they return to discuss it with their fellow jurors in the morning * * * well they can come back here at 9:30."

Thereupon defense counsel stated that defendant objected to the jury being permitted to separate.

The court then had the jury brought before him and, by interrogation of the foreman, elicited his opinion that it did not look like a unanimous verdict would be arrived at "tonight". The court then stated that the jurors were not to read anything or listen to anything about the case or discuss it with anyone. He thereupon dismissed them until 10 o'clock the following morning.

One of the women jurors requested that someone take her to the train depot. As to another woman juror, the marshal told the court that he understood "she lives in Joliet and I think the last train has already gone". A male juror volunteered that there were some trains "between 12:15 and 1:15 that we could catch, if anybody were headed in those directions".

A woman juror stated: "I have to take the Northwestern [Railroad] up to the northeast corner of the state, north of Waukegan * * * I have my car parked down by the railroad track in Waukegan and I drive seven miles from there. It is down in the desolate—" The court interrupted her saying "You can catch your train, I mean, you can get a train?" She answered "Yes".

The court then proceeded to question a male juror who said he would take the subway, and a woman juror said that she could "get the train".

The next woman juror answered by saying that she would take the bus "if I know where I am going". The court clerk volunteered that "The lady takes the Lake Street L."

The court said to a man who intended taking the elevated road home: "All right. You can accompany one of the girls to the elevated. This is one of the obligations of citizenship and we all do the best we can".

Thereupon a bondsman in the courtroom volunteered to drive a juror to Oak Park, but this offer the court declined.

On December 15, 1964, the jury was brought into court and delivered its verdict finding the defendant guilty.

Defense counsel points out that, although the court admonished the jury not to read anything about the case, or listen to any radio or television commentaries or discuss

the case with anyone except fellow jurors, the court made no inquiry of the jurors upon their return the following morning as to whether any of them had read several newspaper articles which appeared, whether they had heard any broadcasts, or whether anyone, member of family or otherwise, had made any comment upon the case and prejudicial matter which defense counsel contended had appeared in two newspapers.

On February , 1965, in *United States* v. *D'Antonio,* 342 F. 2d 667, petition for rehearing *en banc* denied April 9, 1965, we held it was error to permit a jury to separate during its deliberations, over the defendant's objections.

In *D'Antonio,* at 670, we said:

> "At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion. Dispersement into the city at night of a group of men and women who have been deliberating in the security of the courthouse subjects them to the risk of being individually importuned, if not threatened, by telephone calls or personal contacts."

Of course the district court, in the case now before us, did not have before it our decision in *D'Antonio* which had not yet been rendered at the time of the trial in this case. However, the principles which we recognized in *D'Antonio* had long existed and were binding upon the district court in the case now being reviewed. The facts in the record in the case at bar as to the separation of jurors at a late hour at night, leaving each to find the way to his or her respective home, merely further emphasizes the need for applying the established rule which we later reiterated in *D'Antonio.*

We hold that the failure by the court to sequester the jury overnight during its deliberations had a two-pronged effect, first, of exposing the released jurors to exposure to those who might, by printed or spoken word, attempt to influence their official action, and secondly, imposing upon the jurors, especially the women, unnecessary and serious inconvenience. Illustrative of the latter is the mental state of the woman juror who was obliged to go from the courthouse to a railroad station in Chicago at a late hour at night and take a train to a point not far from the Wisconsin-Illinois state line, where she planned to disembark and seek her car parked by the railroad track and then drive seven miles in what she started to describe as "the desolate——" (evidently she was interrupted in making her statement in court). Moreover, she was required to leave her home early the following morning, drive her car to the railroad track and then take a train to Chicago. Thus deprived of a normal period of rest during that night, she was called upon to decide the fate of the defendant on the following morning.

Not only was the treatment accorded the jury in this case unfair to the defendant, but it was violative of the rights and comfort of the jurors themselves. The jury is an important part of the administration of justice. Jurors are entitled to the court's respect and protection. A duty rests heavily upon a trial judge to see that the ability of a juror to perform his or her important function of deciding on the guilt or innocence of one charged with crime shall not be diminished or thwarted by unnecessary exposure to discomfort, improper influence or, especially, personal danger after a jury has commenced deliberating upon its verdict.

In the case at bar, we hold that the district court erred in ordering the jury to separate during its deliberations, especially over defendant's objections. This requires a reversal of the judgment below and a remandment for a new trial.

2. Because this case may be retried in the district court, we will dispose at this time of a point raised by defendant which may again arise upon a new trial.

On the trial in the district court the government produced certain keys marked Government Exhibit 1 and it now contends that the evidence which it there introduced sufficiently identified those keys as those claimed to have been illegally possessed by defendant on April 11, 1963, as alleged in the indictment.

Defendant's counsel insist that proof of "similar" appearance of the keys received in evidence is not sufficient to justify a conviction. They point out that the keys which a boy (Michael McGarr) found were given to a policeman, and that Gerald Esposito, a police officer, testified he got a set of keys from one of the boys at the scene, but he did not know the latter's name. While stating that the keys in evidence were "similar" to the keys which the boy gave him, he was not prepared to state that they were the keys which the boy handed to him that day.

Defendant's counsel charge that there is no proof in the record that the keys which the McGarr boy found and gave to the policeman were the same keys which officer Esposito testified he got from a boy. However, we are not required to say, on the evidence, that the jury might not have been justified in drawing an inference that both McGarr and officer Esposito were testifying about the

same keys. But, to go a step further, there is no proof in the record showing that those keys were actually the keys[1] introduced in evidence as Government Exhibit 1. Officer Esposito testified that after he got the keys he gave them to the *chief of police* in the police station. While Officer Esposito testified that the keys in evidence were *similar* to the ones which the boy gave him, postal inspector Jacobs testified that those keys were in his custody and control from April 11, 1963, when he got them *from* Lieutenant Remkus, to the date of the trial. There is no evidence as to where or from whom Lieutenant Remkus got the keys. He did not testify. It does not appear in the record that Esposito gave any keys to Lieutenant Remkus. As we have said, Esposito gave the keys to his chief of police, who also did not testify.

On a retrial of this case the handling of the keys allegedly thrown away by defendant should be traced by an unbroken chain of evidence.

For the reasons herein stated, the judgment from which this appeal was taken is reversed and this cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL

No. 15028

DUFFY, *Circuit Judge,* concurring in the result.

Consistent with our decision in *United States* v. *D'Antonio,* 342 F. 2d 666, we must hold that it was reversible error to permit the jury in this case, over the objections of the defendant, to separate during its deliberations.

---

[1] We observe from a physical examination that each of these keys bears an identifying number.

The trial of the instant case was prior to our decision in *D'Antonio*. Upon inquiry, the District Judge who presided in this case, learned that several of the District Judges in the Northern District of Illinois, Eastern Division, had adopted the practice of permitting a jury in a criminal case to disband for the night, after the case had been submitted to them by the Court.

I do not agree with the statement in the majority opinion that the treatment of the jury in this case was violative of the rights of the jurors themselves; nor do I think the inference is warranted that the action of the trial judge in this case may have diminished or thwarted the jury from functioning properly by unnecessary exposure to discomfort.

Jury duty is an important duty of citizenship. The performance of such duty may often interfere with the juror's comfort and convenience. Such duty may conflict with previously made plans for engagements.

Neither of the parties to this lawsuit has complained or made an issue of the treatment accorded to members of this jury. As far as the record shows, no member of the jury has complained. What is shown is that the jurors were willing to make great effort to reach their respective homes after the jury was permitted to separate.

At the late hour when it became apparent that a jury verdict would not be reached, it was in the discretion of the trial judge as to how best to handle a difficult situation. I am unable to say there was an abuse of discretion in this respect.

"APPENDIX B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, December 21, 1965

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 15028 v. PAUL W. PANCZKO, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED BY THE COURT that the petition for a rehearing of this cause filed by appellant herein be, and the same is hereby DENIED.

"APPENDIX C"

Fifth Amendment to the Constitution of the United States:

> "... (N)or shall any person be subject for the same offense to be twice put in jeopardy * * *"

Section 1704, Title 18 U. S. Code is as follows:

> "Whoever steals, purloins, embezzles, or obtains by false pretense any key suited to any lock adopted by the Post Office Department and in use on any of the mails or bags thereof, or any key to any lock box, lock drawer, or other authorized receptacle for the deposit or delivery of mail matter; or
>
> "Whoever knowingly and unlawfully makes, forges, or counterfeits any such key, or possesses any such mail lock or key with the intent unlawfully or improperly to use, sell, or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of; * * * [shall be punished]."

Sec. 2106, Title 28, U.S. Code is as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 927

PAUL W. PANCZKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of knowingly possessing two United States mail keys with the intent to unlawfully and improperly use and otherwise dispose of them, in violation of 18 U.S.C. 1704. He was sentenced to imprisonment for ten years.

The evidence [1] showed that, on April 11, 1963, petitioner drove his automobile into the path of a squad

[1] We are filing with the Clerk the transcript of proceedings.

car, impeding pursuit of a stolen truck (Tr. 365-366, 369-370). After the police pulled up next to him, petitioner dropped two keys from his automobile. They were discovered by one of a group of boys who witnessed the occurrence. Asked if the keys belonged to him, petitioner accepted them, responding "Yes, thanks" (Tr. 24-25, 131, 142-144, 181-183, 366-367). Shortly thereafter, another boy found the keys on the grass in the area of petitioner's automobile, and they were again returned to petitioner. After petitioner was taken to the police station, a telephone call summoned an officer back to the scene to pick up the keys, which had been found on the grass for the third time. (Tr. 26-27, 261, 281, 349-350, 358). The keys were brought back to the station and given to the local chief of police (Tr. 350). An hour and a half later, a police lieutenant turned them over to Postal Inspector Jacobs (Tr. 394). On questioning, petitioner told Inspector Jacobs that he had never seen the keys before (Tr. 397-398). The keys were introduced into evidence (Gov. Ex. 1) and identified as a set of mail-carrier keys stolen from the Wicker Park Postal Station in December 1962 (Tr. 299-318, 324-332).[2] The government introduced the supporting testimony of all the individuals who had handled the keys except that of the police lieutenant and the police chief (Tr. 28-29, 143-144, 258, 281-282, 350).

The court of appeals reversed the conviction and remanded the case for a new trial on the ground that

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[2] The keys would open most of the corner mail boxes, depository boxes and storage boxes in the city of Chicago (Tr. 339).

the trial court erred in permitting the jury to disband overnight during its deliberations (Pet. App. 1-6). The court also held that the testimony of the police chief and police lieutenant were necessary because "the handling of the keys allegedly thrown away by defendant should be traced by an unbroken chain of evidence" (Pet. App. 7).

1. Petitioner seeks further review urging that the court of appeals should have ordered a dismissal of the indictment rather than a new trial.[3] The statute (18 U.S.C. 1704) upon which the indictment was based, he contends, is unconstitutionally vague.[4] It is commonly known that tampering with the mails is a serious matter. Even those who gain lawful access

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[3] He also asserts (Pet. 6-7) that he was denied due process because the opinion of the Seventh Circuit did not contain a discussion of this issue. The court of appeals doubtless found the question not worthy of discussion. Its order affirmed the trial court on this point, just as the conviction might have been affirmed by order without opinion.

[4] 18 U.S.C. 1704 provides in pertinent part:

> "Whoever steals, purloins, embezzles, or obtains by false pretense any key suited to any lock adopted by the Post Office Department and in use on any of the mails or bags thereof, or any key to any lock box, lock drawer, or other authorized receptacle for the deposit or delivery of mail matter; or
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> "Whoever knowingly and unlawfully makes, forges, or counterfeits any such key, or possesses any such mail lock or key with the intent unlawfully or improperly to use, sell, or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of * * * *
>
> "Shall be fined not more than $500 or imprisoned not more than ten years, or both."

to mail receptacles or depositories are aware that they must act in a manner consistent with protection of the mails and in accordance with postal regulations. Section 1704 merely proscribes the possession of a key to any receptacle for the deposit of mail "with the intent unlawfully or improperly to use, sell or otherwise dispose of the same." It gives fair warning to an individual who knowingly obtains a postal key that any intentional unauthorized use or disposition of it is prohibited. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-33. See, also, *United States* v. *Harriss*, 347 U.S. 612, 617. Tested by that standard, Section 1704 is clearly valid.

Similar reasoning counters petitioner's argument (Pet. 10-14) that the indictment does not sufficiently charge the offense. The indictment sets forth the elements of the crime, the statute alleged to have been violated, and the serial numbers of the mail keys. It thus contains sufficient detail to protect petitioner from double jeopardy and to enable him to prepare his defense. Further facts come within the scope of a bill of particulars.

2. Petitioner's suggestion (Pet. 7-10) that a second trial after his successful appeal would put him in double jeopardy is of course contrary to long settled doctrine. Even if the court of appeals had determined that the evidence was insufficient to support petitioner's conviction, it could properly have ordered a new

trial. *Bryan* v. *United States*, 338 U.S. 552; *Forman* v. *United States*, 361 U.S. 416, 425. The holding of the Seventh Circuit, however, did not go to lack of evidence; at most, it found error in the trial court's admission of the keys because they were not authenticated by a showing of an unbroken chain of custody. Had the trial judge himself excluded the keys on that theory, the government would have had the opportunity to call additional witnesses to lay the foundation for admission of the keys.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

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PAUL W. PANCZKO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

May It Please The Court:

We believe that on the face of the government's memorandum, petitioner is shown to be entitled not merely to certiorari, but to summary reversal as well. The government states its two points succinctly; we will be equally brief.

1. The government contends that the statute is not unconstitutionally vague because, "it is commonly known that tampering with the mail is a serious matter." (Gov't Mem. 3). It is, we submit, equally well known that conduct is punishable only if denounced by a statute in terms sufficiently specific to enable people of reasonable intelligence to know, by reading the statute, that they are breaking the law. Granted, it is a "serious matter" to tamper with the mails. But petitioner is not accused of tampering with the mails. He is accused of possession of two "mail keys * * * with the intent to unlawfully and improperly use" them. A common abhorence of tampering with the mails is no substitute for a constitutional guarantee. For it is also "commonly known" that a defendant is entitled to be informed of the nature and cause of accusation against him. *United States* v. *Five Gambling Devices,* 346 U.S. 441. This court said there, p. 452: "We think the Act does not have the explicitness necessary to sustain the pleadings which the government has drafted in these cases."

The government also suggests that petitioner's remedy was a Bill of Particulars (Gov't Mem. 4). The government neglects to consider that the petitioner moved for precisely that relief, and that his motion was denied (App. 2). Petitioner's modest request was for a Bill of Particulars showing wherein his intended use of the keys was unlawful. That motion was flatly denied (App. 3). The government's assertion that a Bill of Particulars would have solved petitioner's dilemma, is a concession which might have been more appropriate in the trial court.

2. It was our second contention that defendant should have been discharged because the evidence was insufficient to convict. The government replies, impliedly, that we

are in error—that the evidence was sufficient to convict, but merely insufficient to convict the defendant on trial. The distinction seems a bit delicate in view of the stakes involved.

The government pointed out that had the trial court ruled correctly on the admission of the evidence, the keys would have been excluded unless the government had called additional witnesses. This assertion is of peripheral relevance in the absence of assumption that further evidence was in fact available. But there can be no question that if the trial court had ruled correctly on defendant's motion for acquittal at the close of the case, the government's conjectural additional witnesses would have been of no value. The trial court denied petitioner's motion for acquittal because the government convinced that court, erroneously, that the evidence was sufficient. Had the government's present submission been made on the hearing of defendant's motion for acquittal, the defendant would certainly have been acquitted. What the government in fact suggests to your Honors is that its two errors should cancel each other. We believe nothing more need be said.

For the foregoing reasons, petitioner now prays that this court grant both certiorari and summary reversal, directing the petitioner's acquittal.

Respectfully submitted,

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